Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	IB Docket No. 95-168
Revision of Rules and Policies for the	)	PP Docket No. 93-253
Direct Broadcast Satellite Service	)	

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned rulemaking. NCTA is the principal trade association of the cable television industry in the United States, representing owners and operators of cable television systems serving over 80 percent of the nation's cable television households, as well as over 60 program networks.

INTRODUCTION AND SUMMARY

The Federal Communications Commission's Notice of Proposed Rulemaking ("NPRM") seeks comment on a new regulatory regime for the licensing of spectrum for Direct Broadcast Satellite (DBS) service based on competitive bidding. At the same time, the NPRM seeks comments on whether the Commission should adopt rules that would impose sweeping new restrictions on cable operator participation in the DBS market. We strongly oppose the proposals to single out cable operators and programmers for disfavored status in the competitive DBS marketplace.

The Commission proposes to adopt what it terms "structural" and "conduct" restrictions. The Notice suggests that allegedly "pro-competitive" policies may counsel in favor of imposing limits on ability of existing multichannel video programming distributors ("MVPDs") to fully participate in the DBS marketplace. In this regard, the Notice proposes to uniquely handicap cable operators, querying whether to place spectrum aggregation limits on DBS providers affiliated with MVPDs, whether "a more stringent limitation should be placed on cable operators seeking to acquire DBS licenses or to operate a DBS service, and whether such a limitation should be related to the size of the MVPD involved."[1] Among other things, the Notice seeks comment on a proposal, advanced by cable's competitors for spectrum, that cable affiliated ownership of DBS spectrum "should be prohibited, or in the alternative, that several remedial conditions be imposed."[2] The NPRM in addition suggests the need for "conduct" restrictions in the form of marketing limits, the adoption of new program access requirements, and potentially imposing conditions on the provision of Headend In the Sky ("HITS").

These proposed restrictions are solutions in search of a problem. The speculative fears about the supposed anticompetitive behavior of cable operators are belied by the vibrant nature of the existing DBS marketplace -- one in which some cable operators already participate through PrimeStar. There is not the slightest evidence that PrimeStar has had any anticompetitive impact on the provision of DBS service, and its success thus

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1 NPRM at ¶40.

2 Id. at ¶63.

far is evidence of its contribution to video competition. Further, DBS service already is provided by two powerful and well-financed competitors -- Hughes and USSB-- that not only have access to cable programming services but have their own exclusive contracts as well. As the Notice recognizes, "the two existing DBS operators are each experiencing rapid growth of their DBS service subscriber base, operating DBS systems that offer non-duplicative programming using all of the channels at the 101° orbital location."[3] And two new services -- EchoStar and Alphastar -- have plans to compete in the DBS market shortly.

The call for restrictions on cable's participation in the DBS arena also flies in the face of the Congress' and the Commission's repeated admonitions that competition, rather than regulation, should guide communications policy wherever possible.[4] It would impose restrictions already thoroughly considered and rejected by the Commission and Congress.

Furthermore, the Commission proposes potentially wide-ranging program access provisions that will harm program networks and viewers, and will go way beyond the intent of Congress in the Cable Act of 1992. Again, there is no evidence that the existing DBS providers have been unable to secure cable programming services that they desire to provide their subscribers, and the Notice points to nothing that suggests this will change.

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[3] NPRM at ¶40 (emphasis added).

[4] See, e.g., 1992 Cable Act, Section 2(b)(2). (Congress' policy to "rely on the marketplace, to the maximum extent feasible, to achieve" its goal of making available to the public a diversity of views and information through cable television and other video distribution media).

Finally, the NPRM misconceives the nature of Headend in the Sky service, and proposes to impose regulation of this area where none is warranted.

In short, the NPRM seeks comments on rules that would send Congress' and the Commission's competition policies way off track, veering well beyond any minimal regulation that might be appropriate to ensure that the DBS marketplace remains competitive. The Commission should refrain from adopting broad prophylactic rules limiting cable operator's participation in the DBS marketplace at this time. As demonstrated below, there is no reason to believe, based on the reality of the marketplace activity to date, that operators have engaged or will engage in any of the alleged anticompetitive strategies that the Notice describes. But in any event, existing antitrust laws, the PrimeStar consent decrees, and the 1992 Cable Act's program access rules, are more than adequate to ensure that none of the imagined anticompetitive harms to the DBS market will occur in the future. No further Commission rules are required.

ARGUMENT

I. THE COMMISSION SHOULD NOT RESTRICT CABLE OPERATOR PARTICIPATION IN THE DBS MARKETPLACE

A. Structural Restrictions

The Commission's call for structural limits on cable participation in the DBS arena stems from a highly speculative discussion of the alleged anticompetitive harms that could be visited on DBS providers. It cites to the comments of several rivals for DBS service who claim that "a cable-affiliated DBS provider cannot be expected to compete vigorously with cable systems, and that such an entity would have the incentive and ability to engage

in anticompetitive strategic conduct impeding other DBS providers who are competing with cable systems."[5] This alleged concern of cable's DBS competitors that a cable-affiliated DBS operator might not compete as effectively against them in order to protect their cable interests is more than passing strange. If this were the case, these same DBS competitors raising these concerns would benefit from the allegedly diminished competition they would face.[6] The Commission should recognize that these competitors are not arguing against their self interest. Rather, their opposition is strong evidence that they recognize that cable operator-affiliated DBS providers have incentives to act in a pro-competitive manner.

Moreover, in responding to these competitors' portrayal of cable's supposed anticompetitive incentives, the Notice ignores the actual robust state of the DBS market in particular and the broader video marketplace in general. The Notice also fails to acknowledge existing constraints on cable operators that guard against pursuit of any alleged anticompetitive strategies. The suggestions to further restrict the extent to which cable operators may hold DBS permits or make use of DBS facilities, therefore, go well beyond the minimum necessary to protect that market. Instead, they cross the line into unnecessary government interference in a dynamic communications arena. The Notice demonstrates no need for such a heavy handed approach.

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[5] NPRM at ¶35.

[6] See Consolidated Reply of Tempo DBS, Inc., DBS-94-11 EXT, Declaration of Bruce M. Owen at 3 (filed June 15, 1995) (hereinafter "Owen Declaration").

The Commission, of course, is not writing on a clean slate here. When DBS service was first authorized in 1982, the issue of cable/DBS cross ownership was examined in detail. At that time, the Commission decided against adopting cross-ownership rules, finding that competition in the video distribution market would prevent competitors' ability to engage in anticompetitive behavior.[7]

Seven years later, the Commission reaffirmed this view in the context of examining Tempo's fitness to be a DBS licensee.[8] It there found that, contrary to claims that TCI's acquisition of a DBS system through its ownership of Tempo would increase concentration of control, "Tempo's participation could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming."[9]

Congress also more recently examined the issue of DBS/cable cross-ownership, and it too did not adopt such a ban. Rather, in the course of enacting the 1992 Cable Act, Congress stripped from the Senate bill a provision that would have required the FCC to adopt such a restriction when direct-to-home satellite services obtained ten percent of the television households. Instead, the Conference Report found that "[i]t would be premature to require the adoption of limitations now...."[10]

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7 In the Matter of Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, 90 FCC 2d 676, 711-13 (1982).

8 Continental Satellite Corp., 4 FCC Rcd. 6292 (1989).

9 Id.

10 Conference Report on S.12, 102d Cong., 2d Sess., 138 Cong. Rec. H8329 (daily ed. Sept. 14, 1992).

Against this backdrop, and in light of the intervening market developments, the NPRM's call that there is a need to "revisit the extent to which cable operators may hold DBS permits or make use of DBS facilities"[11] rings particularly hollow. If anything, the DBS marketplace is even more vibrant now than when these previous determinations were made. DBS services that deliver up to 150 channels of traditional cable networks and pay-per-view are now available to every home in the continental United States. DBS providers deliver virtually every program network offered on cable, including movies, sports, and dozens of channels of pay-per-view movies, plus DBS-exclusive programming as well.

PrimeStar faces competition from two high powered DBS providers that were launched in 1994. DirectTV recently announced it passed the million-subscriber mark.[12] USSB, which shares DirecTV's satellite, has "tens of thousands of its own subscribers."[13] It is estimated that DBS companies that are not affiliated with cable will have approximately 5.1 million subscribers by the year 2000 -- an increase of more than 130 percent in just five years.[14] Given this dynamic and growing market, there is simply no reason to revisit the FCC's earlier conclusions that cable ownership of DBS service is permissible.

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[11] NPRM at ¶36.

[12] "Direct Broadcast TV May Go Further Than Many Predicted", Investors Business Daily, Nov. 16, 1995.

[13] Id.

[14] Kagan, Cable TV Investor, May 18, 1994 at 4.

Just as the DBS market has grown, so too has competition for the provision of video programming to subscribers from other service providers. That video marketplace does not just comprise cable and DBS. Rather, the FCC in assessing competition for the delivery of video services has made clear that the entire MVPD market is the "appropriate starting point for assessing the status of competition in the market for delivery of video programming."[15] That market includes not only cable and DBS, but also MMDS (and, soon, Local Multipoint Distribution Service), SMATV, and TVROs.[16] And the telephone companies are poised to be formidable competitors in the video marketplace, both as wireline providers and in wireless, starting with MMDS. Given this dynamic and rapidly changing competitive landscape, the Notice's fears about cable pursuing anticompetitive strategies are unfounded. A cable-affiliated provider of DBS services would not be able to price above competitive levels because most consumers have other ways to receive multiple channels of video programming.[17]

The NPRM's concern that cable operators "may have an incentive to minimize competition from any DBS resources they controlled, and instead to coordinate their DBS activities with those of their other systems to maximize their joint profits"[18] is equally

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[15] Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd. 7442, 7467 (1994).

[16] See Comments of the National Cable Television Association, Inc., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61 (filed June 30, 1995) at 4-18 (describing competition in the video marketplace).

[17] See Owen Declaration at 4-6.

[18] NPRM at ¶37.

without foundation. As described above, two DBS providers with no cable affiliation already have a head-start in the high power DBS marketplace. Any incentive that operators theoretically might have not to vigorously compete with these existing DBS providers have not been borne out by existing behavior. Furthermore, failing to competitively price DBS service would lead to loss of large markets to DirecTV/USSB (or to EchoStar, soon to provide service) which are available in cable and noncable markets throughout the country. [19]

Such behavior would be completely at odds with the substantial real dollar investments necessary to launch high-power PrimeStar. PrimeStar's loss of a customer is not somehow cable's gain, as the Notice seems to assume. It is as likely DirecTV's or USSB's, or, in the future, EchoStar's gain. In short, there is no basis in fact for this concern and no reason to single out cable operators to impose "structural" solutions to guard against anticompetitive behavior.[20]

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[19] See Owen Declaration at 8-9.

[20] The Commission also proposes to adopt rules to guard against concentration among all DBS operators by limiting aggregation of DBS channel assignments to 32 channels at any combination of the orbital locations capable of full-CONUS service. NPRM at ¶41. To the extent the Commission determines that any spectrum aggregation limits are appropriate, for the reasons described above there is no reason to single out cable operators for unique restrictions in this regard. Instead, all DBS providers should be subject to the same constraints.

B. The Commission Should Not Impose its Proposed "Conduct" Restrictions

The Notice also proposes to adopt a variety of "conduct" limitations to "encourage, to the maximum extent possible, rivalry among MVPDs."[21] Among other things, the Notice proposes to impose marketing limitations on cable operators. As the Notice points out, Tempo already is subject to certain limitations that require it (1) not to offer its DBS service primarily as an ancillary service to the services of affiliated cable systems and (2) not to provide its DBS service to subscribers of those systems under different terms than were being offered to non-subscribers.[22] The Notice seeks comments on whether these conditions should be imposed on all cable affiliated DBS services, and whether further restrictions on entering into exclusive distributorship arrangements are warranted.[23]

Extension of these restrictions is unnecessary for several reasons. Given the enormous money operators have poured into creating a new DBS service,[24] it makes no economic sense not to provide service to all potential customers, located both inside and outside cable areas. Failing to fully compete in areas served by PrimeStar's partners' affiliated cable systems would automatically cede large areas of the country to the existing

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[21] NPRM at ¶54.

[22] Tempo II, 7 FCC Rcd 2728, 2731 (1992).

[23] NPRM at ¶55-56.

[24] PrimeStar's partners have committed more than $1 billion to develop, market and administer their DBS service by the year 2000. In addition, PrimeStar has launched a $100 million marketing campaign. See Consolidated Reply of PrimeStar Partners, DBS 94-11 EXT (filed June 16, 1995) at 14.

DBS providers. There is no evidence that PrimeStar has to date followed any of the strategies that led the Commission to adopt the Tempo restrictions. And the Notice provides no reason to believe that PrimeStar or any other cable-affiliated DBS provider would pursue a different strategy in the future.

For the same reasons, restrictions on cable's ability to market DBS service make no sense in the competitive DBS environment. Instead, such one-sided limitations would only serve to impose disadvantages on one competitor and limit its flexibility in the absence of any record evidence that competition has been harmed. It is unnecessary and at odds with the goal of minimum government intervention in the economy to pile on unnecessary regulation of a competitively functioning market.

III. THE COMMISSION SHOULD NOT EXTEND THE REACH OF THE 1992 CABLE ACT'S PROGRAM ACCESS REQUIREMENTS

The NPRM also raises the prospect of new rules that would expand the reach of the 1992 Cable Act's program access requirements. Specifically, the Notice asks whether alleged concerns about "various vertical foreclosure strategies" should "lead the Commission to impose service rules on DBS licensees designed to ensure that competing providers are not denied access to programming."[25]

Section 628 of the Cable Act ensures that DBS providers have access to vertically-owned cable programming services on non-discriminatory terms and conditions. And the Commission recently decided against broadly interpreting these rules, concluding that they

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[25] NPRM at ¶57.

did not extend to exclusive agreements between vertically integrated programmers and non-cable technologies such as DBS.[26] It there recognized that prohibiting such arrangements would "[c]reate an overly broad per se prohibition that appears to be contrary to Congress' intent."[27] The Commission should follow the same approach here, rather than adopt sweeping rules based on wholly speculative concerns.

The Notice cites to no evidence that DBS providers have been unable to enter into agreements with unaffiliated programmers, nor is there any reason to believe that will be the case. Rather, DirecTV has been able to gain access to all these programmers -- and more. As a recent article describes, "DBS subscribers today get a program menu that includes all the options available to cable users, plus a few extras, like more pay-per-view channels and special business or foreign language channels."[28] DirecTV has entered into exclusive, only-on-DirecTV agreements for very desirable programming with the NFL, NBA, and NHL for example. DirecTV reportedly also has explored using programming

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[26] Video Programming Distribution & Carriage (Exclusive Contract Prohibition), 76 R.R. 2d 1177, 1187 (1994). In fact, the Commission believed that exclusive contracts under such circumstances could be pro-competitive: "Such contracts may allow a distributor to distinguish its service from that of another, avoid duplication of programming, and eventually lead to more diversity in programming for the consumer. To the extent contracts allow a greater number of DBS distributors to establish distinctive competing services, we believe they further congressional policy to 'rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming.'" Id.

[27] Id., at ¶41.

[28] Investors Business Daily, Supra.

developed by TeleTV, a joint venture of 3 RBOCs. And EchoStar reportedly has already lined up 65 channels of programming service.[29]

Congress saw no need to apply its program access provisions to non-vertically integrated cable program networks.[30] The Commission's speculative concerns do not support the need to impose new regulatory impediments to the full functioning of the programming marketplace in the DBS context. There is simply no incentive for independent, non-vertically integrated programmers to discriminate against non-cable affiliated DBS providers in a market where maximum distribution is the key to success.[31]

Even if there were some theoretical validity to the Commission's concerns, the existence of the PrimeStar consent decrees, as well as existing antitrust enforcement, obviate the need for any additional FCC rules as a practical matter. The PrimeStar decree includes restrictions on its owners' ability to obtain exclusive programming and program access rules that in some respects exceed the requirements of the 1992 Cable Act.[32] The courts retain jurisdiction to oversee these decrees. There is no need for the Commission to engraft another layer of regulation on top of these existing restrictions.

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[29] Id.

[30] See 1992 Cable Act at Section 2 (a) (5) (finding only that "[v]ertically integrated program suppliers...have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.")

[31] See Reply Comments of the National Cable Television Association, Inc., CS Docket No. 95-61 (filed July 28, 1995) at 11-17 (urging FCC not to apply program access rules to non-vertically integrated programmers.)

[32] U.S. v. PrimeStar Partners, 1994-1 Trade Cos. (CCH) ¶70, 562 (1994); New York v. PrimeStar Partners, L.P., 1993-2 Trade Cos. (CCH) ¶70, 403 (1993).

IV. THE COMMISSION SHOULD NOT IMPOSE ANY RESTRICTIONS ON WHOLESALE DISTRIBUTION OF PROGRAMMING SERVICE TO CABLE OPERATORS

The Notice also seeks comment on the provision of "Headend in the Sky" ("HITS"), and whether the "wholesale" distribution of HITS service raises anticompetitive concerns. HITS, which has not yet begun operation, is a means by which cable operators can obtain digitally compressed programming and increase their offerings to viewers. It will serve the public interest by allowing cable operators -- particularly in rural areas -- to provide their customers increased program choices offered by new digital technology in a cost effective manner. The Commission should not threaten the provision of HITS by prematurely imposing regulation on its distribution.

The Notice's suggested rules in this area are based on a fundamental misconception of HITS' operation. Contrary to the impression conveyed by the Notice, HITS is not the wholesale provision of DBS service. HITS is merely an authorization and transport service that delivers to cable operators compressed and digitized video programming. Each operator contracts directly with the programmer that participates in HITS for service -- HITS, therefore, does not license distribution of these services. As a result, the Commission's suggestion that rules should be adopted to require HITS service to be provided to competing MVPDs on non-discriminatory terms and conditions is wholly misplaced.

Furthermore, the type of function that HITS provides can be performed by other DBS providers, assuming that the programmer and other DBS operators agree to allow a

similar arrangement. There is no showing that such arrangements will not occur in the absence of government intervention -- and, in fact, the Notice suggests that other DBS providers "have also indicated their interest in providing wholesale DBS service."[33] Once again, if the Commission seeks to regulate in a manner that minimizes government intrusion where the market is properly working, it is misguided to launch an antitrust dragnet against the HITS distribution arrangements.

CONCLUSION

The Commission should not interfere with workings of the dynamic DBS arena by handicapping cable operators' ability to fully compete. For the reasons described above, the Commission should not adopt the Notice's proposed restrictions that would uniquely disadvantage cable operators and programmers from participation in the DBS marketplace.

Respectfully submitted,

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[33] NPRM at ¶61 n. 97.